WONG JOON KAI

v.

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HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[ORIGINATING PETITION NO: 28-106-2000]
30 JANUARY 2002

COMPANY LAW: *Winding-up - Petition - Amendment - Amendment to incorporate new allegations - Whether allowable - Guiding principles - Whether amendment made in good faith - Whether not causing substantial injustice - Whether not changing character of suit - Companies Act 1965, ss. 218, 221(2)(e) - Companies Winding-up Rules 1972, rr. 8(1), 194 - Rules of the High Court 1980, O. 9, O. 20 r. 7, O. 92 r. 4*

This was an application by the petitioner to amend the petition it had filed against the respondent pursuant to s. 218 of the Companies Act 1965. The amendment sought was wide ranging and would in essence expand the 92 paragraphs in the original petition to 124. *Inter alia*, the application sought to amend the intitulement from 'originating petition' to 'companies winding-up', insert a specific limb of the Companies Act 1965 ('the Act'), delete, substitute and elaborate on paragraphs, add new paragraphs and add new allegations against the respondent. Opposing the application, the respondent argued that the same ought to be disallowed as the amendment was with respect to evidence and would change the character of the petition. The main issue that arose was whether the amendment sought by the petitioner herein would contravene any of the provisions of the Companies Act 1965 ('the Act') and the Companies Winding-Up Rules 1972 ('the Rules').

Held:

[1] The general principle guiding the court in granting amendments is that the court would allow such amendments as would cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, namely: (a) whether the application is *bona fide*; (b) whether the prejudice caused to the other side could be compensated by costs; and (c) whether the amendments would not in effect turn the suit from one character into a suit of another character. (p 1024 d)

[2] The evidence as disclosed did not suggest any bad faith on the part of the petitioner. The amendment sought did not in any way alter or affect the basic tenor of the petition to wind up the company arising from allegation of dishonest acts of the controlling directors. The scheme of the amendment by deleting, consolidating and elaborating on matters arising from petition cannot be said to be motivated by bad faith. (p 1025 g-h)

[3] The amendment to the title, being to rectify the defect in the heading, is consonant with the requirement of r. 8(1) of the Rules and such defect falls within the category of defects which does not invalidate the proceedings as prescribed by r. 194 of the Rules. No substantial injustice was hence caused to the respondent by the amendment. In any case, the respondent has responded to the original petition with the defective heading, and this conduct was tantamount to waiver of the irregularity. Likewise, the insertion of the more specific limb of s. 218(1) of the Act was only to make the issue clearer and such an amendment is justifiable. (p 1026 c-d)

[4] The amendment sought relates in the main to amendment of the facts averred which is necessary to establish the petitioner's entitlement to the relief sought. As the amendment is to the averment of fact in the petition, the same cannot tantamount to amendment of evidence. (p 1027 c-f)

[5] As to paras. 36 to 78, the paragraphs condescended on more comprehensive facts relating to allegations of fraudulent claims, inflated insurance claims, overcharging by holding company, fictitious machinery charges, which resulted in illegal profits. This being the case, the basic tenor as averred in the original petition remains. The related amendments were thus made with a view of providing a clearer picture of the various allegations. They were not inconsistent with the averments in the original petition. (p 1028 e-h)

[6] Order 20 r. 5 of Rules of the High Court 1980 ('RHC') permits an amendment to include a new cause of action if it arises out of the same facts as the original cause of action in which the relief has already been claimed. The evidence here involves the same parties and substantially the same facts with changes in the description and hence falls within the situation envisaged by the Order. It follows that, even if the amendment to para. 45 here involved a new allegation, the court could still allow such amendment as to do so would be in the interest of justice and would determine the real questions in controversy. (p 1029 b-c)

[7] The objection that some of the amendments relate to post-petition events cannot be sustained. As provided for in O. 18 r. 9 RHC, facts to be pleaded in the petition which arose before or after its issuance, could clearly be amended. (p 1030 a)

[Application allowed.]

Case(s) referred to:
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***
Fairview Schools Bhd v. Indrani Rajaratnam [1998] 1 CLJ 285 CA ***(refd)***
Hargill Investments Pty Ltd v. Newman Air Charter Pty Ltd [1990-1991] 5 ACSR 321 ***(refd)***
Kevalair Pty Ltd v. The Companies Act [1980] ACLC 34 ***(refd)***
Maril Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Palaniappan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 HC ***(refd)***
UMBC v. PORLA [1983] 1 MLJ 206 ***(refd)***
Yamaha Motor Company Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(1), 221(2)(e)
Companies (Winding-up) Rules 1972, rr. 8(1), 28, 194
Rules of the High Court 1980, O. 9, O. 18 r. 9, O. 20 rr. 5, 7, O. 92 r. 4

Other source(s) referred to:
Malaysian High Court Practice (1998) Desk Edition, p 552

For the petition - Ewe Chuan Seng (Ranjit Singh); M/s Ewe & Co
For the creditor (supporting) - HK Ling; M/s Isa, Ling & Mok
For the respondent - Nagarajah Muttiah (Lai Wai Fong); M/s Shook Lin & Bok
For the creditor (opposing) - Ben Chan (Chong Choon & Lewis Lim); M/s Lee Hishammudin

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:
The petitioner's application in encl. 54 is for amendment of the petition herein. The application is supported by three affidavits of the petitioner in encls. 53, 63 and 75 and the affidavit of Loi Tuan Ee affirmed on 20 March 2001 is filed in opposition. The original petition comprised of 92 paragraphs and the proposed amendments have been expanded to 124 paragraphs and it is proposed to adopt the segmentation as categorised by the petitioners.

a The first head relates to the amendment as to the title of the petition from originating petition to Companies Winding-Up and the insertion of the more specific limb of s. 218(1) of the Companies Act 1965 namely sub-s. (f) and (i) thereof and the rewording of para. 1 and 2 into a single paragraph and it encompasses paras. 1 to 5.

b The second head relates to the correction of the shareholding structure and the inclusion of certain events occurring after the petition so as to reflect the latest position by the deletion and substitution of the relevant paragraphs and the inclusion of an additional paragraph detailing the shareholding structure of the company. The relevant paragraphs are paras. 6 to 25.

c The third head involves three paragraphs and it relates to the addition to para. 31 to extend to expectation of future dividends arising from the representation and the inclusion of a new para. 32 averring to a further representation by the company's then shareholder/director one Ho Saw Leong.

d The fourth head relates to the deletion of certain allegations in para. 35.

The fifth head encompasses paras. 36 to 78 – the paragraphs relates to the allegation proper pertaining to the allegation of fraudulent claims, inflated insurance claims, overcharging by holding company, under declaration on
e unburnt paper rolls stock, fictitious machinery rental charges, fictitious engineering machinery bills purportedly purchased on behalf of the company which resulted in illegal unlawful profits. The amendment mechanism employed was by way of deleting certain unnecessary and unsubstantiated allegation and elaboration of facts and adding same and deletion of some paragraphs and
f transposition and rewording of same with elaboration into new paragraphs.

The sixth head encompasses paras. 79 to 96 and deletion of paras. 84 to 86.

The seventh head encompasses paras. 97 to 104 which covers allegations prior to the petition and paras. 105 to 112 which covers events after the petition.

g The eighth head encompasses paras. 113 to 124 relating to elaboration on the earlier averments appearing in the original petition.

The ninth head relates to the amendment praying for the appointment of a professional public accountant and not the official receiver as the liquidator of
h the company.

The respondent's objections in opposing the amendment can be summarised as follows:

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1. The amendment by way of retraction of certain paragraphs, the intitulement and the nature of proceedings makes the petition inconsistent and changes the character of the petition.

2. The amendment herein which has been verified by affidavit tantamount to an amendment of evidence and as such not permissible unlike an amendment of pleadings.

3. Amendment does not relate to the elaboration of new grounds as it was in existence before presentation of petition.

4. Order 20 r. 7 RHC regulates amendment other than winding-up petition.

I shall now address the issues raised by the respondent. The relevant provision in the Companies Act 1965 empowering amendment is s. 221(2)(e) which *inter alia* empowers the court to allow the petition to be amended or withdrawn.

The Companies Winding-Up Rules 1972 unfortunately is silent on the rules regulating amendments of petition for winding-up and hence the question arises whether the rules regulating amendments under O. 20 of the Rules of the High Court 1980 is applicable.

In the Court of Appeal case of *Fairview Schools Berhad v. Indrani a/p Rajaratnam & Ors* [1998] 1 CLJ 285 it was established that where the Companies Winding-Up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not it can always resort to O. 92 r. 4 of the Rules of the High Court 1980 (RHC).

Applying the principle so established since the Winding-Up Rules 1972 is silent as to the amendment provision, this court is empowered to apply the provisions regulating amendments as prescribed under O. 20 RHC under the inherent powers conferred by O. 92 r. 4 RHC.

Petitions as an originating process is laid down in O. 9 of the RHC wherein the prescribed usage thereof is in the context of the case herein recognised by the governing written law of the Companies Act and the Companies Winding-Up Rules 1972 which stipulates the initiation of winding-up proceedings by way of petition.

At the outset I wish to stress that the defect relating to the term "originating petition" instead of "companies winding-up petition" in the title of the action as prescribed by r. 8(1) of the Companies (Winding-Up) Rules 1972 is curable under r. 194 of the Companies (Winding-Up) Rules 1972 which expressly stipulates that formal defects does not invalidate the proceedings unless substantial injustice has been caused by the defect or irregularity.

That no substantial injustice has been caused to the respondent can be seen by the fact that the respondent has subsequent to the petition filed in several affidavits without raising any objections to the heading as such and their conduct shows that they were never misled and any irregularity has been waived and hence no substantial injustice can be said to be caused thereby.

As the provisions under O. 20 r. 5 RHC relating to amendment of writ or pleading with leave is applicable to petitions as an originating process by virtue of r. 7 thereof, the evaluation of the established principles through decided authorities regulating amendments and their applicability is necessitated.

In *Yamaha Motor Company Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; ([1983] CLJ (Rep) 428) the Federal Court laid down the guidelines in the following terms at p. 192 (p. 429):

> The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result: a) whether the application is *bona fide*; b) whether the prejudice caused to the other side can be compensated by costs; and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

In *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693 the High Court held:

> The courts have a wide discretion whether or not to allow an amendment. The proper test to apply is not whether the amendment would cause injustice to the other party, but whether in the circumstances of the case, it was just to grant leave. In exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment. Generally, the courts readily grant leave to amend before trial, so long as the application is made in good faith and within a reasonable time and so long as the injustice caused to the opponent can be compensated by costs.

In *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361, the Court of Appeal after reviewing the earlier authorities held:

> The authorities had strongly indicated that the courts should lean towards granting applications for amendment even when a new cause of action or line of defence was raised provided it was based on the same facts or arose out of the same transaction subject to an award of costs for the injustices caused by the amendments.

In *Malaysian High Court Practice* (1998) Desk Edition in its commentary of O. 20 at p. 552 stated as follows:

> The general principle guiding the Court in granting amendments is to allow such amendments as will cause no injustice to the other side. In order to determine whether injustice would result, certain other principles would have to be considered – *Ismail bin Ibrahim v. Sum Poh Development Sdn Bhd* [1988] 3 MLJ 348. In *Looi Guan Kway v. Low Lean Bok & Ors* [1938] MLJ 35 upon an application by the plaintiff to amend the plaint, Aitken J after a study of the relevant authorities enunciated three subsidiary principles for the guidance of the court ie, that a) there is *bona fides* on the part of the applicant b) the amendments cause no prejudice to the other side which cannot be compensated by costs; c) they are not such as to turn a suit of one character into a suit of another and inconsistent character.

From the aforesaid it can be safely deduced that the essential basis for asking for leave to amend is that the application is genuine and necessary. The circumstances in which amendments may be sought are infinitely various and a decision granting or refusing leave in a particular case may be no ground for refusing or granting leave in another. In short each case must be decided having regard to all the surrounding circumstances of the particular case, including any protective terms as to costs or otherwise to compensate for or to mitigate the altered position of the opposite party.

Applying the principles distilled from the established authorities the first and paramount consideration is whether the application for leave is made in good faith ie, for the purpose of raising "the real question in controversy between the parties." Indeed the first question the court ask itself when dealing with an application for leave to amend is: "Is this genuine or what lies behind the application?" The amendment must be made *bona fide* and not *mala fide*, nor intended to overreach the opposite party, or made for other ulterior motive. The amendment must be based on facts which are substantially true and germane to the matters in controversy between the parties.

The objective behind amendments namely to determine the real questions in controversy between the parties and that it would be in the interest of justice and hence the justice factor must invariably weigh upon the judge's mind in approaching the question of *bona fide.*

The evidence as presented herein does not disclose any suggestion of the application being made in bad faith. The amendments sought does not in any way alter or affect the basic tenor of the petition to wind up the company arising from the allegation of dishonest acts of the controlling directors. The scheme of the amendment by deleting, consolidating, adding and elaborating on matters arising from petition cannot be said to be motivated by bad faith.

Adverting to the amendments sought as I have stated earlier the original petition has 92 paragraphs. The amended petition has been expanded to 124 paragraphs.

The first head relates to the amendment to the title and inclusion of more specific limb of the Companies Act and encompassing paras. 1 to 5 of the petition. The amendment to the title is by way of deletion of the title "originating petition" and substituting therefore the title "companies winding-up" and the insertion of limbs (f) and (i) of s. 218(1) of the Companies Act 1965.

There is also the deletion of paras. 1 and 2 and the substitution of same through rewording in one paragraph. The amendments as such in my view is solely made not only to rectify the mistake in the title but also to make it clearer. The amendment as to the title being to rectify the defect in the heading is consonant with the requirement of r. 8(1) of the Companies Winding-Up Rules 1972 and such defect in my view falls within the category of defects which does not invalidate the proceedings as prescribed by r. 194 of the Companies (Winding-Up) Rules 1972. I cannot see any substantial injustice being caused on the respondent nor are they misled as the respondent has responded to the original petition with the defective heading through the filing of numerous affidavits using the same defective heading throughout without any objections. Their conduct as such is tantamount to waiver of any irregularity. Again the insertion of the more specific limbs of s. 218 (1) of the Act is to make the issues clearer by reference to the particular limbs so as to obviate any doubts and hence surely such as amendment is justifiable and must be allowable. So too with the deletion and combination of paras. 1 and 2 into a single paragraph which is to make the averment of facts clearer and hence allowable.

The second head encompasses paras. 6 to 25. Principally it relates to the correction of the shareholding structure of the respondent company and the inclusion of certain events occurring after the presentation of the petition by the deletion and additions of certain passages to certain paragraphs – see paras. 6 to 20, the deletion and substitution of certain paragraphs – see paras. 21 to 24 and the addition of a paragraph detailing in graphic chart – para. 25 – of the shareholding structure of the respondent company. The principal objection of the respondent under this head is that the deletion of certain sentences in paras. 12 and also the subsequent paragraphs relating to aspersions of fraud changes the character of the petition and makes it inconsistent.

I have considered the objections raised and after a careful perusal of the offending paragraphs I cannot see any inconsistency which changes the character of the petition. The basic tenor of the averments in the original petition relating to the shareholding structure of the respondent company remains and the

addition on the contrary is not only consistent but makes the position as to shareholding structure clearer so that all parties concerned would be put in perspective and apprised as to the latest position.

Paragraphs 31 to 33 which is categorised under the third head and the averments relates to the reasons for the subscription of shares in the respondent company by the petitioner. It involves an amendment to para. 31 to include expectation of future dividends and also the addition of a new para. 32 averring to a further representation by the company's then shareholder/director one Ho Saw Leong of the invitation to subscribe having the consent and blessing of the controlling directors. The objection mounted by respondent is that since such averments are *prima facie* evidence by reason of the verifying affidavit such an amendment amounted to amendment of evidence and hence cannot be done. Further the addition of a further representation in para. 32 would have the effect of making it inconsistent with the earlier averment. The contention of the respondent that just because of the requirement of verification of the petition by affidavit the amendment to the petition amounted to amendment of evidence is untenable. As was stated by Malcolm CJ in *Hargill Investments Pty Ltd v. Newman Air Charter Pty Ltd* [1990-1991] 5 ACSR 321:

> The Rules require that the petition be treated, in effect, as a pleading in which there should be set out all necessary statements of material facts necessary to establish the petitioner's entitlement to the relief sought. The affidavits filed contain the evidence to prove the facts pleaded in the petition ...

Hence from the above observation the amendment sought on the petition relates to amendment of the facts averred which is necessary to establish the petitioners entitlement to the reliefs sought so that the real question in dispute can be determined. The amendment as such is similar to the amendment of pleadings save that the amendment must be followed by verification in the form of fresh affidavit as required by the provisions of the Companies Winding-Up Rules 1972. As the amendment is to the averment of fact in the petition it cannot tantamount to amendment of evidence for the obvious reason that the affidavit is never amended, but is subsequently filed afresh because of the requirement of verification.

It should be emphasised that the courts have all along notwithstanding the requirement of verifying affidavit allowed the amendment of petitions applying the established general principles regulating amendment of pleadings in that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or correcting any defect or error in any proceedings – *Hargill Investments Pty Ltd v. Newman Au Charter Pty Ltd* [1990-1991] 5 ACSR 321. In fact the courts have readily granted amendments to a deficient petition if the effect shows that the petitioners has or probably

has a case which, if established, could result in the petitioner obtaining relief – *Kevalair Pty Ltd v. The Companies Act* [1980] ACLC 34, 189 at 34, 193-4. In the local context the high authority is the Court of Appeal case of *Maril Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 where amendments to winding-up petitions was allowed without any rider that it tantamounts to amendment of evidence.

Again the contention that the addition of a further representation in para. 32 would have the effect of making it inconsistent is untenable. The original petition has alluded to a representation and hence a further representation and by the same person at that cannot have an inconsistent effect and so I hold.

The fourth head relates to the deletion of allegations relating to the cash reserve of the respondent and adding an averment of a fire incident which gutted the factory on 2 January 1998 which were exploited by the controlling directors to make fraudulent claims and subject the company to indiscriminate transfer of funds. The amendment as such, in my view is permissible as the objective is not to place facts which cannot be substantiated and would not assist in determining the real controversy between the parties. It should also be observed that in the original petition by para. 32 fraudulent claims against insurance company arising from the fire had been averred and hence the formulation of the wording in para. 35 addresses the same question of fraudulent claims on the insurance company – it is not something new.

Paragraphs 36 to 78 comprises the fifth head. The amendment sought relates to amendment in the sub-heading of the allegation proper by changing and substituting insurance claims with fraudulent claims and illegal profits. The paragraphs condescend on more comprehensive facts relating to the allegation of fraudulent claims, inflated insurance claims, overcharging by holding company, under declaration on unburnt paper rolls stock, fictitious machinery rental charges, fictitious engineering machinery bills purportedly purchased on behalf of the company which resulted in the illegal/unlawful profits. Upon perusing the amendment sought one feature that stands out is that the basic tenor as averred in the original petition remains – the averments was rehashed by the deletion of certain paragraphs and transposed and reworded with elaboration in new paragraphs. The amendment mechanism employed by way of deleting unnecessary and unsubstantiated allegation and elaboration of facts and the addition and elaboration of facts and transposition and rewording of same into new paragraphs in my view was made with the intention to provide a smoother flow of the various allegations and is not inconsistent with the averments in the original petition for the obvious reason that the substance of the allegation remains.

The objection by respondent under this head is centred on their contention that the amended para. 45 is not an elaboration but a new allegation, paras. 45 to 60 relates to matters existing before the petition and so too paras. 61 to 72 which though portrayed as new grounds existed prior to the petition.

The answer to the respondents' contention that the amendment raises a new allegation is to be found in O. 20 r. 5 of the High Court 1980 which permits amendment to include a new cause of action provided it arises out of the same facts as the original cause of action in which the relief has already been claimed – *Yamaha*'s case. The evidence herein involves the same parties and involved substantially the same facts with changes in the description and hence falls within the situation envisaged by O. 20 r. 5 RHC. The court in such circumstance in the exercise of its discretion can allow such amendments on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy.

On the contention that the amendment to paras. 48 to 72 relates to matters existing before the petition I must again emphasise that the substance and essence of the allegation appears in the original petition and the additions made is intended to give a clearer picture – and hence such a contention is untenable. So long as it is made *bona fide,* which is the case here, and is not one where it cannot be compensated by costs, it is just for the court to grant the amendment sought – *Palaniappan v. University Pertanian Malaysia* [1995] 1 CLJ 693.

Paragraphs 79 to 96 comprises the amendments sought under the sixth head. It relates to the provision of further particulars and elaboration on the allegations appearing in the original petition with a view of making it clearer and better and involves the deletion of three paras. 84 to 86. The objection raised by the respondent is again on the ground that the amendments are not permissible as it relates to matters existing before petition though portrayed as new allegations. I allowed the amendments based on the same reasoning as laid down under the fifth head above.

The seventh head encompasses paras. 97 to 104 which relates to allegations prior to the petitions and paras. 105 to 112 which covers events post-petition. The amendment includes averment of removal of the two directors supporting the petition to show continuing course of oppressive conduct. The objection of the respondent is principally that post-petition facts cannot be included through amendment.

The objection of the respondent cannot be sustained for reason that facts to be pleaded in the petition which arose before or after its issuance can be amended and this is specifically provided for by O. 18 r. 9 Rules of the High Court 1980 which in my view is applicable to amendments of petition. The Federal Court in *UMBC v. PORLA* [1983] 1 MLJ 206 has impliedly acknowledged that pleadings can be amended to include facts that have occurred post pleadings.

The eighth head which encompasses paras. 113 to 124 is principally an elaboration of earlier averments which was in existence at time of petition. The amendment is allowed based on the same reasoning under the fifth head aforesaid.

The ninth head relating to the amendment praying for the appointment of a professional public accountant instead of the official receiver is clearly permissible more so the reliefs prayed if successful would invariably require the services of a professional public accountant to administer the liquidation.

Before concluding I wish to address the issue on whether an opposing creditor has the requisite *locus* to address the court in opposing the application to amend. I ruled against the opposing creditor for the reason that r. 28 of the Companies Winding-Up Rules 1972 only permits the opposing creditor who has filed and served the notice of intention to appear on the hearing of the petition to support such petition. Since the application herein is not a hearing of the petition and since the amendment to the petition is a matter concerning the petitioner and respondent the opposing creditor has no *locus* to address the court on the amendment question.

For the reasons stated above I allowed the petitioner's application in encl. 54 to amend the petition and awarded costs in the respondent's favour.